Lee Tak Suan v Tunku Dato' Seri Shahabudin bin Tunku Besar Burhanuddin & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S-24–2357 OF 2005
ASMABI MOHAMAD JC
17 AUGUST 2012

Unincorporated Associations — Societies — Dispute between members and club — Rights and obligations of members determined by club's rules — members contractually bound to accept majority decisions — Courts to only interfere if majority's decision icontrary to club's rules

Unincorporated Associations — Societies — Suits — Claim by members of club against management committee for breach of trust and fiduciary duties — Action against management committee of Selangor Turf club — Losses incurred due to investment made in shares of public company through put and call options — Whether purchase of shares was ultra vires or in breach of the constitution and the rules of the club — Whether procedure for investment in the club's rules was complied with — Whether investment was actually a money lending transaction — Whether breach of duty established

This action was filed by the plaintiff who was a member of the Selangor Turf club ('the club') on behalf of himself and other members of the club against the first to the seventh defendants ('first to seventh defendants') for breach of fiduciary duties and/or breach of duty of care and or breach of trust involving the purchase of RM30m worth of shares in a company known as Fountain View Development Bhd ('Fountain View') ('the said shares'). The action against the eighth defendant was in his capacity as the public officer of the club. The plaintiff claimed that the purchase of the said shares was ultra vires and/or in breach of the constitution and the rules of the club. The club was a sports and social club registered under the Act and managed by a Committee. The club invested its funds in public listed companies. With the aim of getting fast returns for its investment the Committee decided to diversify its investment approach. Dato' Chin, a major shareholder and Director in Fountain View offered to place out 1.85 million Fountain View shares to the club at a discounted price of RM5.40 per share under a put and call option agreement with the club. The Committee requested the club's Manager of finance and administration department ('DW1') to study the investment proposal. The decision to accept the offer by Dato' Chin was done via Circular Resolutions which were circulated to the first to seventh defendants. The Committee also relied on DW1's report when making the decision. The Circular Resolutions

were signed and approved by the Committee and subsequently ratified by the Committee in a meeting. After recovery of the capital as well as the net profit of RM953.278.08 in respect of the firstPut and call optionthe club was again approached by Dato' Chin with a proposal to place out 4 million Fountain View shares at RM5.00 per share. The total value of these shares was RM20m. Dato' Chin also agreed to deposit some Fountain View shares as security for the fulfilment of his obligation under the Second Put and Call Option. The mechanics which led to the approval and or execution of the Second Put and call Option were similar to firstPut and Call Option. However, this time Dato' Chin was not able to comply with the term of the Put and call optionto re-purchase the shares from the club and several extensions of time were given. At the same time the price of the Fountain View shares fell. Several settlement agreements were entered into between the parties. Dato' Chin agreed to transfer some landed properties to the club as security. The club then disposed of the entire Fountain View shares. A sum of RM10m was also received by the club as payment pursuant to the sale and transfer of certain landed properties. Dato' Chin then proposed to resolve the outstanding amount owed to the club by payment of a full and final figure of RM3,800,000. By accepting this proposal the Committee had agreed to waive the sum of RM2,226,771.35 owed by Dato' Chin. The issues arising in this suit were: (i) whether the two transactions relating to the purchase of the said shares were in substance and reality a loan; (ii) what is the true effect and scope of rule 24 of the club's rules. rule 24 provided for the procedure to be invoked in the event the Committee intended to incur any expenditure exceeding RM500,000; (iii) whether the Trustee Act 1949 ('the Act') applied to the club; (iv) whether the first to seventh defendants acted in breach of trust and or breach of fiduciary duty when they took the various decisions relating to the two transactions; and (v) whether the club suffered a loss of RM2,226,771.35 as a result of the two transactions.

Held, dismissing the plaintiff's claim with costs:

(1) Put and Call Options are the common features and well accepted shares investment mechanism. This method of investment are used in share transaction to avoid and or reduce risk caused by market factors. Put and call option agreements have been regularly used and recognised in shares transactions in Malaysia. All acts undertaken by the respective parties to the Put and call option agreements in this case were consistent with that of a normal Put and call option agreement used in sale and purchase of the shares in market. The plaintiff had failed to discharge the burden to prove that these transactions were money lending transactions as claimed (see paras 32–33).

(2) This being a dispute between the members and the club whose rights and obligations are determined by the club's rules, the relationship is one of contract. By accepting membership of the club a member of the club contracted to be bound by the club's rules. Hence the relationship

between the members vis-a-vis the club and as between the members are contractual in nature. Unless if it can be proved that the club had acted ultra vires the club's rules, the Courts would be reluctant to interfere with the internal affairs of the club. Therefore in view of the contractual nature of the relationship the members are contractually bound to accept the majority decision of the members decided by the AGM. Whatever differences and or dispute between the members and the club must be resolved within the constraint of the club's rules. The court would only interfere with the decisions of the members only if it is contrary to the club's rules (see para 46).

(3) The transactions undertaken by the Committee were not expenditure per se as envisaged by rule 24 of the club's rules. Hence, for the purposes of investment of this nature, which was the purchase of shares from Fountain View by way of the Put and call optionthe Committee was not required to comply with the provision of rule 24. Hence the Committee had not acted in contravention of rule 24 (see para 50).

(4) rule 24(a) of the club's rules provided that all funds and property of the club shall be vested in the Committee. Hence the Committee acts as trustee for ordinary members of the club. Section 5(3) of the Act provides that the trustee may invest trust funds in any security (see para 53).

(5) A reconciliation of s 2(2) of the Act and the trust instrument in the form of the club's rules showed that the powers of the Act are in addition to the powers conferred by the club's rules. Further the Act provides that the provision of the Act are only applicable if and only if the contrary intention is not expressed in the club's rules. In the case at hand there is an express contrary provision via rule 2(o) of the club's rules to empower the Committee to invest the funds of the club in such asset or in such manner as it may think fit. Hence the provision of the club's rules overrode s 5 of the Act (see para 58).

(6) As regards to the plaintiff's contention that there was no due diligence exercise conducted by the Committee and or a proper meeting to discuss the huge investment proposal that was to be undertaken by the club, the court found that the Committee had acted prudently in carrying out their obligations entrusted by the club's rules (see para 63).

(7) The plaintiff had failed to discharge the burden placed by the law to prove that the acts of the first to seventh defendants in venturing into the two alleged transactions had resulted in the club having suffered losses as submitted by the plaintiff (see para 72).

[Bahasa Malaysia summary

Tindakan ini telah difailkan oleh plaintif yang mana merupakan ahli kelab Lumba Kuda Selangor ('kelab tersebut') bagi pihaknya dan ahli-ahli yang kelab

yang lain terhadap defendan pertama hingga defendan ketujuh ('defendan pertama hingga defendan ketujuh') untuk percanggahan tanggungjawab-tanggungjawab fidusiari dan/atau percanggahan kewajipan berhati-hati dan atau percanggahan amanah yang melibatkan pembelian saham-saham bernilai RM30 juta di dalam syarikat yang dikenali sebagai Fountain View Development Bhd ('Fountain View') ('saham-saham tersebut'). Tindakan terhadap defendan kelapan adalah dalam kapasitinya sebagai pegawai am kelab tersebut. Plaintif mendakwa bahawa pembelian saham-saham tersebut adalah ultra vires dan/atau melanggar perlembagaan dan peraturan-peraturan kelab tersebut. Kelab tersebut merupakan kelab sukan dan sosial yang didaftarkan di bawah Akta dan dikendalikan oleh jawatankuasa. Kelab telah melaburkan dananya sendiri di dalam syarikat yang disenaraikan secara awam. Dengan tujuan untuk mendapat pulangan dengan lebih cepat untuk pelaburannya jawatankuasa memutuskan untuk mempelbagaikan pendekatan pelaburannya. Dato' Chin, pemegang saham besar dan Pengarah Fountain View telah menawarkan untuk menempatkan 1.85 juta saham-saham Fountain View kepada kelab pada harga yang didiskaunkan iaitu RM5.40 satu saham di bawah perjanjian Put and call option dengan kelab tersebut. Jawatankuasa telah meminta pengurus jabatan kewangan dan pentadbiran kelab tersebut ('DW1') untuk meneliti cadangan pelaburan tersebut. Keputusan untuk menerima tawaran oleh Dato' Chin telah dilakukan melalui Resolusi Pekeliling yang mana telah diedarkan kepada defendan pertama hingga defendan ketujuh. Jawatankuasa juga telah bergantung kepada laporan DW1 semasa membuat keputusan tersebut. Resolusi Pekeliling telah ditandatangani dan diluluskan oleh jawatankuasa dan kemudiannya telah diratifikasikan oleh jawatankuasa di dalam suatu mesyuarat. Selepas mendapatkan semula modal dan juga keuntungan bersih sebanyak RM953.278.08 berhubung dengan Put and call option pertama kelab telah didekati oleh Dato' Chin sekali lagi dengan cadangan untuk menempatkan 4 juta saham-saham Fountain View dengan RM5.00 satu saham. Jumlah nilai saham-saham tersebut adalah RM20 juta. Dato' Chin juga telah bersetuju untuk mendepositkan sedikit saham-saham Fountain View sebagai jaminan untuk memenuhi tanggungjawabnya di bawah Put and call option kedua. Mekanisma yang membawa kepada kelulusan dan atau pelaksanaan Put and call option kedua adalah sama dengan Put and call option pertama. Walau bagaimanapun, untuk kali ini Dato' Chin gagal untuk memenuhi terma Put and call option untuk membeli semula saham-saham daripada kelab dan beberapa lanjutan masa telah diberikan. Pada masa yang sama harga saham Fountain View jatuh. Beberapa perjanjian penyelesaian telah dimeterai di antara pihak-pihak. Dato' Chin bersetuju untuk memindahkan beberapa hartanah kepada kelab sebagai jaminan. Kelab telah melupuskan keseluruhan saham-saham Fountain View. RM10 juta juga telah diterima oleh kelab sebagai bayaran menurut penjualan dan pemindahan beberapa hartanah. Dato' Chin kemudian mencadangkan untuk menyelesaikan amaun tertunggak kepada kelab dengan membayar jumlah

penuh dan akhir sebanyak RM3,800,000. Dengan menerima cadangan ini jawatankuasa telah bersetuju untuk mengetepikan jumlah RM2,226,771.35 yang terhutang oleh Dato' Chin. Isu-isu yang berbangkit di dalam guaman ini adalah: (i) sama ada kedua-dua transaksi berkenaan dengan pembelian saham-saham isi hal dan secara realiti suatu pinjaman; (ii) apakah kesan dan skop sebenar peraturan 24 peraturan-peraturan kelab. Peraturan 24 memperuntukkan prosedur yang harus dilakukan sekiranya jawatankuasa berkeinginan untuk menanggung sebarang perbelanjaan melebihi RM500,000; (iii) sama ada Akta Pemegang Amanah 1949 ('Akta') terguna pakai kepada kelab; (iv) sama ada defendan pertama hingga defendan ketujuh telah melakukan percanggahan amanah dan atau percanggahan kewajipan fidusiari apabila mereka telah mengambil pelbagai keputusan berkenaan dengan kedua-dua transaksi; dan (v) sama ada kelab mengalami kerugian sebanyak RM2,226,771.35 akibat daripada kedua-dua transaksi tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Put and Call Options merupakan ciri biasa dan mekanisma pelaburan saham diterima dengan baik. Cara pelaburan ini digunakan dalam transaksi saham untuk mengelakkan dan atau mengurangkan risiko disebabkan faktor-faktor pasaran. Perjanjian Put and Call Options biasa digunakan dan dikenali dalam transaksi saham-saham di Malaysia. Kesemua tindakan yang diakujanji oleh pihak masing-masing terhadap perjanjian Put and call option dalam kes ini adalah konsisten dengan perjanjian Put and call option yang biasa digunakan dalam perjanjian jual beli saham-saham di pasaran. Plaintif gagal melupuskan beban untuk membuktikan bahawa transaksi-transaksi ini adalah transaksi meminjam wang seperti yanng didakwa (lihat perenggan 32–33).

(2) Memandangkan pertikaian ini adalah di antara ahli-ahli dan kelab yang mana hak-hak dan tanggungjawab ditentukan oleh peraturan kelab, hubungan ini adalah satu kontrak. Dengan menerima keahlian kelab, seorang ahli kelab adalah terikat oleh peraturan kelab tersebut. Justeru hubungan di antara ahli-ahli vis-a-vis kelab dan ahli-ahli adalah bersifat kontraktual. Melainkan jika ia dapat dibuktikan bahawa kelab telah bertindak secara ultra vires peraturan kelab, mahkamah berat hati untuk campur tangan urusan dalaman kelab tersebut. Oleh itu, melihat kepada hubungan kontrak semulajadi ahli-ahli adalah terikat secara kontraktual untuk menerima keputusan majoriti ahli-ahli yang diputuskan oleh AGM. Apa-apa perbezaan dan atau pertikaian di antara ahli-ahli dan kelab harus diselesaikan dalam peraturan kelab yang terhad. Mahkamah hanya akan campur tangan dengan keputusan ahli-ahli jika ia bercanggahan dengan peraturan kelab (lihat perenggan 46).

(3) Transaksi yang diakujanji oleh jawatankuasa bukanlah perbelanjaan seperti dinyatakan oleh kaedah 24 peraturan kelab. Oleh itu, untuk

tujuan pelaburan bersifat sedemikian, yakni pembelian saham-saham Fountain View melalui Put and call option Jawatankuasa tidak perlu mematuhi peruntukan peraturan 24. Justeru jawatankuasa tidak bertindak berlawanan dengan peraturan 24 (lihat perenggan 50).

(4) Peraturan 24(a) peraturan kelab memperuntukkan bahawa kesemua dana dan harta kelab terletakhak dengan jawatankuasa. Oleh itu Jawatankuasa bertindak sebagai pemegang amanah untuk ahli-ahli biasa kelab. Seksyen 5(3) Akta meperuntukkan bahawa pemegang amanah boleh melaburkan dana-dana amanah dalam mana-mana jaminan (lihat perenggan 53).

(5) Penyelarasan s 2(2) Akta dan instrumen amanah dalam bentuk peraturan kelab menunjukkan bahawa kuasa-kuasa di dalam Akta adalah penambahan kepada kuasa-kuasa yang diberikan oleh peraturan kelab. Selanjutnya Akta memperuntukkan bahawa peruntukan Akta hanya tergunapakai sekiranya dan hanya sekiranya niat yang berlawanan tidak digambarkan dalam peraturan kelab. Dalam kes ini terdapat peruntukan berlawanan yang jelas melalui kaedah 2(o) peraturan kelab untuk memberi kuasa kepada jawatankuasa untuk melaburkan dana-dana kelab dalam aset atau dalam cara yang ia rasakan sesuai. Justeru peruntukan peraturan kelab melawan s 5 Akta (lihat perenggan 58).

(6) Berkenaan dengan hujahan plaintif bahawa tidak terdapat pelaksanaan ketekunan wajar yang dilakukan oleh jawatankuasa dan atau mesyuarat untuk membincangkan bahawa cadangan pelaburan yang besar tersebut akan diambil alih oleh kelab, kelab mendapati bahawa jawatankuasa telah bertindak dengan hemat dalam menjalankan tanggungjawab mereka yang diamanahkan oleh peraturan kelab (lihat perenggan 63).

(7) Plaintif telah gagal untuk melepaskan beban yang diberikan oleh undang-undang untuk membuktikan bahawa tindakan-tindakan oleh defendan pertama hingga defendan ketujuh dalam memasuki kedua-dua transaksi yang didakwa telah menyebabkan kelab mengalami kerugian yang dihujahkan oleh plaintif (lihat perenggan 72).]

Notes

For cases on suits, see 12 *Mallal's Digest* (4th Ed, 2011) paras 3154–3157.

Cases referred to

Charan Dass a/l Sadhu Ram v YM Tunku Abd Aziz & Ors [2006] 3 MLJ 416, HC (refd)

Commissioner of Income Tax, UP v Nainital Bank Limited AIR 1967 SC 453, SC (refd)

Datuk Pasamanickam & Anor v Agnes Joseph R Narayanan Samy v Agnes Joseph [1980] 2 MLJ 92, FC (refd)

Fortune Wealth (Hong Kong) Ltd v Maju Holding Sdn Bhd [2001] MLJU 571; [2002] 3 CLJ 329, HC (refd)
Geering (deceased) Gulliver And Anor, Re v Geering And Ors [1964] Ch 136, Ch D (refd)
HLG Credit Sdn Bhd & Anor v Chan Teik Huat [2011] MLJU 694 HC (refd)
Inland Revenue Commissioners v Bernstein [1960] Ch 444, Ch D (refd)
Oram (Inspector of Taxes) v Johnson [1980] 2 All ER 1, Ch D (refd)
Peczenik's Settlement, Re; Cole and Another v Ingram And Ors [1964] 2 All ER 339, Ch (refd)
Tharmalingam v Sambanthan [1961] 1 MLJ 63, CA (refd)
Turner's Will Trusts, District Bank, Limited, Re v Turner [1937] Ch 15, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101, 106, Part III
Trustee Act 1925 [UK] s 69(2)
Trustee Act 1949 ss 2(2), 5, 5(3), 69(2)
Societies Act 1966 s 9(c)

(Tommy Thomas) for the plaintiff.
(Sitham & Associates) for the first to seventh defendants.

Asmabi Mohamad JC:

BACKGROUND

[1] This action was filed by the plaintiff who was a member of the Selangor Turf club ('the club') on behalf of himself and other members of the club against the first to the seventh defendants ('the first to seventh defendants') for breach of fiduciary duties and/or breach of duty of care and or breach of trust involving the purchase of RM30m worth of shares in a company known as Fountain View Development Bhd from May 2004 to August 2004 ('the said shares'). The action against the eighth defendant was in his capacity as the public officer of the club, which action, was filed pursuant to s 9(c) of the Act. In his statement of claim ('SOC') the plaintiff claimed that the purchase of the said shares was ultra vires and/or in breach of the Constitution and the rules of the club. The plaintiff prayed for the following relief:

(a) a declaration that the purchase of the said shares was ultra vires the constitution and the rules of the club;

(b) a declaration that the first to seventh defendants acted in breach of trust in causing the club to purchase the said shares;

(c) alternatively, a declaration that the first to seventh defendants acted in breach of fiduciary duty in causing the club to purchase the said shares;

(d) in further alternative, a declaration that the first to seventh defendants acted negligently in causing the club to purchase the said shares;

(e) an order for the first to seventh defendants to furnish an account of all trust monies pertaining to the said purchase and their subsequent sale;

(f) an order for the first to seventh defendants to fully reimburse the club for all loses suffered by the club as a result of the purchase of the said shares; and

(g) general, aggravated and exemplary damages, costs and other relief his court deemed fit.

[2] This case proceeded by way of a full trial with two witnesses having testified for the plaintiff and three witnesses for the defendants. After having given much consideration to the evidence, both documentary as well as testimonial, and the submissions by learned counsels for the respective parties I found that the plaintiff had failed to prove his case on the balance of probabilities. Hence on 28 May 2012 I dismissed the plaintiff's claim with costs. After hearing both learned counsels on the issue of costs I ordered for the plaintiff to pay costs of RM100,000 to the first till the seventh defendants and RM15,000 to the eighth defendant respectively.

[3] Aggrieved by the said decision the plaintiff appealed to the Court of Appeal Malaysia against the whole of the said decision.

THE DOCUMENTS

[4] At the outset of the trial parties have agreed for the following documents to be used:

	Description	Document
i.	Bundle of pleadings	'A'
ii.	Preliminary CBOD (Part A)	'B'
iii.	Bundle of document	'B2'
iv.	Supplementary CBOD (Part B)	'B3'
v.	Bundle of affidavits (Vol 1)	'B4'
vi.	Plaintiff's bundle of document	'C1'
vii.	first- fifth and seventh defendants BOD	'C2"
viii.	Preliminary CBOD (Part C)	"C3'
ix.	BOD affidavits (Vol 2)	'C4'
x.	Reports of receiver accountants	'C5'
xi.	Issues to be tried	'D'
xii.	Statements of disputed facts	'E'
xiii.	Plaintiff's opening statement	'F'

xiv.	Defendant's opening statements	'G'

THE PARTIES

[5] The plaintiff in this action is a member of the club which was registered under the (Act 335) ('Act'). The first to seventh defendants were at all material times elected as the Committee Members of the club for the years 2003–2005 ('the Committee'). The eighth defendant was at all material times the general manager and the most senior full-time employee cited herein in his capacity as the public officer of the club pursuant to s 9(c) of the Act. The plaintiff commenced this action on behalf of all the members of the club save for all the first to seventh defendants cited herein who were sued in their capacities as the committee of the club and the eighth defendant as a public officer of the club respectively. The first defendant was the chairman of the committee and the second defendant was the deputy chairman of the committee. The eighth member of the committee one Mr Tan Kheng Seng died on 10 January 2005.

THE FACTS

[6] The facts were not much in dispute and are summarised as follows.

[7] The club is a sports and social club registered under the Act and it is being managed by a Committee of eight members pursuant to r 20(a) of the club's constitution and rules ('the club's rules') (see bundle B1 at pp 13–14). In the years 2003–2005 the club was under the control and management of the committee.

[8] As at 31 December 2003 the club had invested its funds in public listed companies such as Sime Darby Bhd (for RM593,535), Shell Bhd (for RM320,224), Tanjong PLC (for RM81,000) and Astro Bhd (for RM36,500). The dividends received from these investments for the year 2004 was RM178,460.

The first put and call option agreement

[9] As at 30 April 2004, the club had some RM76m funds standing in its account on fixed and call deposits. Due to its sound financial standing and with the aim of getting fast returns for its investment the Committee decided to diversify its investment approach. It was around April 2004 when the club, through one Mr Tan Kheng Seng, who was the eighth member of the committee, now deceased, was approached by one Dato' Chin Chan Leong ('Dato' Chin') a major shareholder and director in a company known as Fountain View Development Bhd ('Fountain View'), a company listed on the

main board of the KLSC, and offered to place out 1.85m Fountain View shares to the club at a discounted price of RM5.40 per share, the total of which was RM9.99m. Dato' Chin was also agreeable to enter into a put and call option agreement with the club. For the due performance of his obligations under the put and call option Dato' Chin was prepared to deposit an additional 3 million shares of the Fountain View shares in HSBC Nominee Tempatan Account of the club.

[10] After having been approached by Dato' Chin, Mr Tan Kheng Seng, who himself was a Committee at the material time strongly recommended the Committee to accept Dato' Chin's offer for the club to invest in Fountain View. The Committee then requested the club's Manager of Finance and Administration Department, one Mr Term Boon Keng ('DW1') to study the proposal for investment and prepare a brief report on the viability of the proposed investment to be submitted to the committee for its deliberations. DW1 was a graduate from University of Arkansas at Little Rock, Arkansas USA with a degree in Business Administration and Masters in Business Administration majoring in Finance. In the course of his assessment of the proposed purchase of the said shares DW1 had relied on the reports by Inter Pacific Research Sdn Bhd and the Maybank Securities Bhd (at pp 40–46 respectively of bundle B2) which according to DW1 were favourable to the proposed investment. DW1 then recommended the purchase of the Fountain View shares at RM5.40 per share amounting to RM9.99m shares to be transacted by way of a put and call option agreement and a placement agreement and also to accept as security the 3 million Fountain View shares by Dato' Chin for the due performance of his obligations under the put and call option agreement.

[11] According to DW1 the RM76m cash belonging to the club was only able to generate an average income of about 3.2%pa based on its current and conventional mode of investment. DW1 was of the view that to enable the club to generate higher yield on its investment the club must be ready to venture into other more profitable and better investment mechanisms. The offer by Dato' Chin was a good opportunity for the club to consider. In his offer Dato' Chin had agreed to place out 1.85 million shares at a discounted price of RM5.40 (the market price being RM5.80) at a total price of RM9.99m with an offer to give a put and call option to the club to repurchase in three months the 1.85 million shares at RM5.94 amounting to RM10,989,000. This investment would enable the club to earn the net profit of RM999,000 which represent 10% return for the said investment within a short span of three months. Further the said investment would be secured by the deposit of an additional 3 million Fountain View shares in HSBC Nominee Tempatan Account of the club, which shares shall be returned to Dato' Chin upon Dato' Chin's acting on the put and call option.

[12] Both DW1 and Dr Chan Lam Kong ('DW2') confirmed that there were no meetings convened by the committee to discuss the proposed investment. The decision to accept the offer by Dato' Chin was done via Circular Resolutions which were circulated to the first to seventh defendants dated 30 April 2004 (at p 94 bundle B2) based on the investment proposals by Dato' Chin. The committee relied on DW1's report when making the decision to approve the purchase of the Fountain View shares by way of the put and call option. Besides that the Committee consisted of experienced members, such as the late Mr Tan Kheng Seng who had extensive experience, among others, in financial service industry and having worked as an advisor to a Japanese company, Sumitomo Heavy Industries Ltd and also DW2 who has the experience in business having run a company known as Morisen (now part of IOI which is listed) and conversant in business and commercial matters. The Circular Resolutions were signed and approved by the committee and subsequently ratified by the committee in a meeting held on 13 July 2004 (at pp 92–95 and 124–125 of B2).

[13] On 5 May 2004 the club entered into a placement agreement with Koleksi Generasi (M) Sdn Bhd for the purchase of 1.85 million Fountain View shares for RM9.99m at RM5.40 per share (at pp 3–7 of bundle B3). The club then entered into a put and call option agreement ('the first put and call option' at pp 96–107 of bundle B2) with Dato' Chin whereby Dato' Chin agreed that he would have a call option to require the club to sell the 1.85 million Fountain View shares to him at a call option price of RM10,989,000 or RM5.94 per share in three months ('call option period–1 August 2004'). In the event Dato' Chin failed to exercise the said put and call option upon maturity of the call option period, the club would be able to exercise its put option and require him to purchase the 1.85 million shares at a put option price of RM10,989,000. For the due performance of his obligations pursuant to the put and call option agreement Dato' Chin had agreed to deposit an additional 3 million Fountain View shares in HSBC Nominee Tempatan Account of the club (pp 96–107 of bundle B2).

[14] On 28 July 2004 and well within the three months period as agreed by both parties Dato' Chin issued a call notice (p 209 bundle C1) to the club intimating that he was ready to re-purchase the said 1.85 million shares. DW1 then caused a report (at pp 214–215 of bundle C1) to be circulated to the committee notifying the committee of Dato' Chin's option under the put and call agreement on 27 July 2004 and that the club would receive the monies on 30 July 2004. HSBC had confirmed re-purchase price of RM10,964,678.08 had been duly received by the club. The net profit received by the club in respect of the first put and call option was RM953,278.08.

Second put and call option agreement

[15] After recovery of the capital as well as the net profit of RM953,278.08

in respect of the first put and call option the club was again approached by Dato' Chin with a proposal to place out 4 million Fountain View shares at RM5 per share. The total value of these shares was RM20m. In the second put and call option Dato' Chin agreed to re-purchase the said 4 million shares from the club at RM5.35 per share, the sum total of which was RM21,350,000 in three months. In the event Dato' Chin exercised his right to re-purchase the said shares at RM5.35 per share the club would enjoy the net profit of RM1,350,000 in three months. In addition to that Dato' Chin had also agreed to deposit an additional 6 million Fountain View shares as security which was to be returned to Dato' Chin upon the fulfilment of his obligation under the second put and call option. The mechanics which led to the approval and or execution of the second put and call option were similar to first put and call option. In view of the success of the first put and call option the Committee was motivated to invest in the Fountain View shares. Hence the Committee gave the green light for the club to proceed with the second placement agreement and also the second put and call option agreement.

[16] The second placement agreement was executed on 30 July 2004 with Mujur Zaman Properties Sdn Bhd for the purchase of 4 million Fountain View Shares at the purchase price of RM20,045,640m (at pp 12–16 of bundle B3). At the same time the second put and call option agreement was entered into by the club and Dato' Chin for the purchase of the 4 million shares at RM21,350,000 from the club in three months expiring on 1 November 2004 (at pp 111–123 of bundle B2). An additional 3.224 million Fountain View shares were also deposited in HSBC Nominees Tempatan Account of the club making a total 6 million shares as security. The sum of RM20,045,640 comprised of RM14,808,770 and RM5,225,000 respectively were debited from the club's account for the purchase of the 4 million Fountain View shares (pp 131–132 of B2).

[17] This time Dato' Chin was not able to comply with the term of the put and call option to re-purchase the 4 million shares from the club within the three months period as stipulated in the agreement and requested for three months extension effective from 1 November 2004 to 1 February 2005 to re-purchase. Dato' Chin had negotiated for a reduction in the re-purchase price vide a letter dated 26 January 2005 from RM21,250,000 to RM21,050,000. Dato' Chin had also offered to pay the club the sum of RM1,350,000 as sponsorship for organising the club's international racing in year 2005. By a reply slip dated 22 October 2004 Dato' Chin was given the extension to exercise his put and call option and followed by the execution of the supplemental agreement dated 28 December 2004 (at pp 140–144 of bundle B2). Dato' Chin had also paid the sponsorship money of RM1.35m (at pp 24–32 of bundle B3). Before the expiry of the first extension Dato Chin requested for another extension until 30 April 2005 for him to exercise his

option to re-purchase the shares. Dato' Chin had also offered to sponsor the club RM1,250,000 as stake money and for other activities deemed suitable by the Committee (at pp 33–35 of bundle B3 and p 224 of bundle B2). By a reply slip dated 27 January 2005 the Committee approved Dato' Chin's request for extension to exercise his option to re-purchase the shares. Another supplemental agreement dated 15 February 2005 (pp 226–230 of bundle B2) was executed granting Dato' Chin the extension.

[18] Although the closing price of the Fountain View shares stood at RM4.96 which was four cents lower than the earlier purchase price of RM5 the Committee was of the view that the difference in price would not dilute the security position as the club was holding 10 million Fountain View shares in terms of security shares valued at RM49.6m (see pp 222–223 of bundle B2). The Committee was of the view that the position of the club would not be jeopardised. Hence Dato' Chin was granted the extension of the call option period.

[19] However as at 27 January 2005 at the time the second extension was granted to Dato' Chin the Fountain View shares closed at RM4.96 per share. On 28 April 2005 the said shares dropped further to RM4.84 and then to RM3.60 and lastly on 29 May 2005 the shares dropped to RM1.77. As at 10 May 2005 it plunged down to RM0.47 cents (see pp 244–250 of bundle B2). Despite the two extensions having been granted Dato' Chin was not able to honour his call option after the maturity of the second extended call option period. The committee then exercised its put option and issued a put notice to Dato' Chin requesting him to purchase the 4 million Fountain View shares at RM21,050,000. However Dato' Chin failed to comply with the said notice (at p 43 of bundle B3).

[20] Due to the failure of Dato' Chin to comply with the notice issued by the club, it negotiated with Dato' Chin who proposed to settle the put and call option exercise price of RM21,050,000 by 31 December 2005. Dato' Chin had also agreed to transfer some landed properties worth RM40m to the club as security in addition to the 10 million Fountain View shares which was already held by the club under the second put and call option agreement. This led to the execution of the settlement agreement by the club and Dato' Chin (see pp 44–60 of bundle B3 and p 61 of bundle B3). Subsequent to that the club disposed of the entire 10 million Fountain View shares. The said shares were sold at RM0.50 per share and the total sum obtained from the said sale was RM2,023,287.60. This was followed by the sale of the 6 million Fountain View shares held by the club as security which was supposed to be returned to Dato' Chin in the event Dato' Chin exercised his option to re-purchase the shares within the three months stipulated period. These security shares were also sold at the RM0.50 cents per share, the total sum of which was

RM2,999,941.05 was credited to the club's account in HSBC (at pp 62–64 of bundle B3 and pp 236–238 of bundle B2). A

[21] On 9 May 2005 the club entered into a settlement agreement (at pp 293–305 of bundle C1) with Dato' Chin and his nominee company, Matrix Homes Sdn Bhd stipulating the amount owing by Dato' Chin to the club as on the date of the execution of the settlement agreement as RM16,026,771.35. In order to secure the said amount, Matrix Homes agreed to transfer the bungalow lots measuring 1,292,547 sq ft to the club to be held as security. This led to the execution of sales and purchase agreements (and other related documents) over the bungalow lots between the club and Matrix Homes Sdn Bhd (at pp 65–77 of bundle B3). At the time of the execution of the settlement agreement the security documents were not delivered as the primary concern of the club at the material time was for Dato' Chin to execute the settlement agreement as acknowledgment of his debt to the club. However after the partial payment of RM10m on 20 October 2005 these documents were delivered to the club. The value of the security was reduced taking into account the partial payment. B C D

[22] A deed of assignment was entered into between the club ('assignee') and Saujana Pertiwi Sdn Bhd ('Saujana Pertiwi') ('assignor') for the assignment of RM5m being part of the proceed recoverable from the sale by Saujana Pertiwi of properties to WCT Land Bhd under a sale and purchase agreement dated 25 March 2005 (at pp 78–88 of bundle B3). On 11 July 2005 the club being the assignee entered into a supplemental deed of assignment of a further RM5m with Saujana Pertiwi ('assignor') for the assignment of another RM5m being part of the proceeds receivable from the sale by Saujana Pertiwi of properties to WCT Land Bhd pursuant to the sale and purchase agreement dated 25 March 2005 (at pp 91–99 of bundle B3). A sum of RM10m was received by the club as payment due under the deed of assignment and the supplemental deed of assignment. Hence the amount owing by Dato' Chin was further reduced to only RM6,023,771.35m (see pp 108–112 and pp 113–115 of B3). E F G

[23] By a letter dated 21 November 2005 Dato' Chin proposed to resolve the outstanding amount owed to the club by payment of a full and final figure of RM3,800,000 (at p 116 of bundle B3). The committee having considered the report presented by DW1 had agreed to accept Dato' Chin's proposal of a final payment of RM3.8m. By accepting this proposal the committee had agreed to waive the sum of RM2,226,771.35 owed by Dato' Chin. The payment of RM3.8m owed by Dato' Chin was paid by Saujana Pertiwi vide a deed of assignment dated 8.12.2005 entered into by the club and the said Saujana Pertiwi (at pp 117–126 and 140–147 of bundle B3). This sum was deposited into the Maybank Account of the club. H I

[24] The investments undertaken by the club as reflected in the first and second put and call option agreements and all other documents related to these two agreements were reflected in the club's financial statements which formed part of the club's annual reports for the year 2005. The said statement of accounts were tabled and discussed during the AGM and the same were approved by the majority of the members of the club. Before the tabling of the financial statements in the annual reports for 2005 the statements were examined and audited by the club's official chartered accountants Messrs KPMG (see p 309 of bundle B2). Messrs KPMG had certified that the club had received the entire cost of investment of RM20,045,640.

[25] The annual report inclusive of the financial statements were circulated to all members of the club for the purpose of the AGM. The issue pertaining to the investments were discussed at length during the AGM and finally unanimously approved by the members of the AGM held on 8 June 2006 (see pp 335–352 of document B2). The plaintiff was present in the AGM.

THE ISSUES TO BE TRIED

[26] Based on the above facts the parties herein had agreed for the following six issues to be tried and determined by this court:

(a) whether the two transactions relating to the purchase of the said shares were in substance and reality a loan;

(b) what is the true effect and scope of rule 24 of the club's rules;

(c) whether the Trustee Act 1949 applies to the club;

(d) whether the first to seventh defendants acted in breach of trust and or breach of fiduciary duty when they took the various decisions relating to the two transactions;

(e) whether the club suffered a loss of RM2,226,771.35 as a result of the two transactions; and

(f) what relief should the court grant if liability is established against the first to seventh defendants.

THE FINDINGS AND EVALUATION

Burden of proof

[27] The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950 ('Act 56'). Pursuant to s 101 of Act 56, the legal burden of establishing the facts pleaded in the SOC is on the

plaintiff. At the conclusion of the case this court has a duty to determine whether sufficient evidence had been adduced by the plaintiff to prove his claim on the balance of probabilities for judgment to be entered in favour of the plaintiff and or for the prayers sought in the SOC to be granted in favour of the plaintiff.

[28] Pursuant to s 106 of Act 56 the burden to prove any facts which is especially within the knowledge of the plaintiff lies on the plaintiff.

[29] With this principle in mind I would now evaluate the plaintiff's evidence in order to ascertain if the plaintiff had met with the standard of proof envisaged by the law. In assessing the plaintiff's evidence I have to ask myself and be fully satisfied whether based on the evidence adduced by the plaintiff, the plaintiff had proved its claim against the plaintiff on the balance of probabilities.

ISSUE (a)

Whether the two transactions relating to the purchase of the said shares were in substance and reality a loan

[30] It was the plaintiff's contention that based on the facts of this case and supported by various contemporaneous documents produced in this court the second put and call option agreements entered into between the club and Dato Chin were in fact RM20m loans granted by the committee to Dato Chin. According to the plaintiff the fact that there was a definite period of three months each for repayment, a predetermined profit element to represent interest and also the security element of RM3m for the first put and call option agreement and RM6m for the second put and call option agreement respectively proved that these two transactions undertaken by the club were in fact term loans.

[31] Before venturing into the investment in shares by way of the put and call option the committee had sought the opinion of an independent consultant Messrs TH Law and Co, a firm of chartered accountants on the possibility of investment in shares quoted in KLSE and was accordingly advised by the said consultant vide its letter dated 13 April 2004 (see p 175 of bundle C1) that it could invest in good counters in the main board of KLSE. The said consultant had also advised the club to consider entering into call and put option agreement to ensure guaranteed investment returns. The advised was sought on 13 April 2004 before the first put and call option was entered into by the club and Dato' Chin on 5 May 2004.

[32] Both DW1 and DW3 had testified that the placement agreements

(between the club and Koleksi Generasi (M) Sdn Bhd and between the club and Mujur Zaman Properties Sdn Bhd) and the put and call option agreements entered into between the club and Dato' Chin were financial investment instruments for investment in shares. Even the club's external auditors Messrs KPMG had confirmed that the investment in the Fountain View shares were 'investment' in accordance with the club's accounting policy and approved accounting standard in Malaysia (see p 251 of document B2). The put and call options are the common features and well accepted shares investment mechanism. This method of investment are used in share transaction to avoid and or reduce risk caused by market factors. The put and call option agreements have been regularly used and recognised in shares transactions in Malaysia. The features of the transactions which I had discussed earlier are common features of a put and call option agreement and are regularly employed in share investment.

[33] The cases illustrated by learned counsel for the first to seventh defendants such as *Fortune Wealth (Hong Kong) Ltd v Maju Holding Sdn Bhd* [2001] MLJU 571; [2002] 3 CLJ 329;*&"" Anor" procphrase="&"v" party2="&"Chan Teik Huat&"> HLG Credit Sdn Bhd & Anor v Chan Teik Huat* [2011] MLJU 694 clearly demonstrated the existence of such an investment mode known as the put and call option which is a recognised transaction in shares trading. Likewise the contemporaneous documents which were produced in court proved that the transactions undertaken by the club were in fact a recognised mode of investment. All acts undertaken by the respective parties to the put and call option agreements in this case were consistent with that of a normal put and call option agreement used in sale and purchase of the shares in market. Even the court appointed receiver accountant Mr Tan Kin Kheong (PW2) had admitted in cross-examination that he would not be in a position to confirm if these transactions were money lending transactions (see Q&A 71 at p 38 of notes of proceedings day two, 21 February 2012). The report prepared by PW2 made no mentioned of the transaction being a money lending transaction as claimed by the plaintiff.

[34] Further the documents which were produced in court as stated in this judgment by way of the various reply slips and or Circular Resolutions, the placement agreements, the second put and call options documentations, the request for extension of time and the supplemental agreements executed allowing for extension of time for Dato' Chin to re-purchase the Fountain View shares and the subsequent settlement agreements were clear evidence of a put and call option instruments as stated by the first to seventh defendants. Even the plaintiff was not able to challenge the evidence of the first to seventh defendants that these transactions were not put and call option agreements.

[35] It was the plaintiff's contention that these transactions were loans

granted by the club to Dato' Chin. The plaintiff having claimed to be an experience ex deputy chairman of the KL Stock Exchange (currently known as Bursa Saham) was of the view that the put and call option undertaken by the club was not an investment as the club would not be a long term owner of the shares had failed to demonstrate to this court that these transactions were in fact money lending transactions. Even PW2 who was supposed to be an independent witness having been appointed by the court, appeared to be biased towards the plaintiff and testified that these investments were in substance a loan and any profit made was interest (at paras 12,16 and 21 of bundle C5) but offered no justifiable and reasonable explanation for his conclusion. When quizzed by learned counsel for the first to seventh defendants DW2 admitted that he was in no position to confirm whether these transactions were money lending transactions. Neither was this fact mentioned in the report prepared by PW2 (bundle C5). Hence DW2's written report contradicted his sworn oral testimony in court.

[36] DW3 who is an accountant with KPMG who was responsible for auditing the club's financial statements as an independent auditors confirmed that the purchase of the Fountain View shares were shown in the cash flow statement for financial year ended 31 December 2005 (at pp 202 and 303 of B2). DW3 had also confirmed that KPMG had classified the purchase of the Fountain View shares as investment in accordance with the club's accounting policy and applicable approved accounting standards in Malaysia (see p 251 of bundle 'B2'). Further DW3 had confirmed that the said transactions were in fact investment for the reason that the shares were bought and registered in the club's name, the dividends are payable to the registered owner, the club was free to trade with the said shares anytime, at any price and to any one before the call option is exercised and this mode of investment are derivatives and instruments used to manage credit risk of an investment. DW3 reiterated that in 2004/2005 per the accounting convention the transactions were to be treated as investment.

[37] Based on the evidence adduced and in view of the plaintiff's failure to demonstrate to this court that these transactions were in fact money lending transactions I have no hesitation to rule that the plaintiff had failed to discharge the burden placed on him by the law to prove that these transactions were money lending transactions as claimed. In view of the above I found that this issue posed for this court's determination must be answered in the negative.

ISSUE (b)

What is the true effect and scope of rule 24 of the club's rules

[38] The plaintiff's second contention was that the committee had acted

ultra vires the provision of rule 24 of the club's rules in deciding to invest in Fountain View shares as it had not complied with the procedure stipulated in rule 24 of the club's rules.

[39] Rule 20(a) of the club's rules (at p 13 of bundle B1) provides that the management and affairs of the club shall be vested with the Committee. Rule 23(a) (see p 15 of bundle B1) provides for the scope on how the management and affairs of the club shall be run by the Committee. Rule 24 of the club's rules (see p 15 of bundle B1) provides that all funds and property of the club shall be vested on the Committee. In the event the Committee intends to incur any expenditure exceeding RM500,000 it must comply with the provision of rule 24 which requires a notice to be sent to all ordinary and life members of the club notifying them of the proposed expenditure of a sum exceeding RM500,000. A similar notice must also be posted on the notice board at the secretary's office for a period of three weeks. Only if no objection is received within three weeks from at least ten members of the club the committee shall proceed with such expenditure. In the case at hand none of this procedure was complied with. Therefore the Committee had acted ultra vires rule 24 of the club's rules in investing in Fountain View shares. It was further contended by the plaintiff that the opening words of rule 24 create an express trust with respect to all funds and property of the club. Therefore the Committee act as trustee for the ordinary members of the club and the Committee who are trustees shall have control of such funds and property. Further rule 24 used the word 'expenditure' twice.

[40] Learned counsel for the plaintiff urged this court to give the word 'expenditure' the ordinary dictionary meaning. As for the word 'expenditure' the *Oxford Dictionary* described it to mean 'spending (of money, etc); using up, consuming; amount expended'. Whilst the word 'investment' was defined by *Oxford Dictionary* to mean 'investing of money; money invested; Property in which money is invested'. According to learned counsel for the plaintiff 'expenditure' is genus which represents kind of things, and includes subordinate kinds or species while 'investment' is species. Genus consists of several species. Species on the other hand is a group or category within genus, and subordinate to it. Under this dichotomy any kind of investment which involves the spending of money belonging to the club constitute an 'expenditure'.

[41] Hence learned counsel for the plaintiff had urged this court to give the word 'expenditure' in rule 24 of the club's rules a general and broad term to include all types and manner of spending. In conclusion learned counsel for the plaintiff submitted that whether the transactions discussed earlier on herein

were loans or genuine investment in Fountain View shares they were 'expenditure' within the broad meaning. Hence caught by rule 24 of the club's rules.

[42] Learned counsel for the plaintiff submitted that his line of submission was further supported by a written opinion by Mr N Nahendran, a well known and experienced lawyer from Messrs Kadir, Andri Aidham & Partners who opined that based on the proper construction of rule 24 of the club's rules it is clear that the intention of the rule is to place a limit on the committee's spending in order to protect members against potential excesses by the committee. Therefore for the purposes of rule 24 every transaction would have to be scrutinised and decided on its own facts to see whether if in essence what is being done is in fact an artificial mechanism to bypass rule 24 of the club's rules.

[43] Based on the aforesaid argument learned counsel for the plaintiff concluded that the Committee had acted in breach of the requirement of rule 24 of the club's rules. Hence their conduct was unconstitutional and ultra vires rule 24 of the club's rules.

[44] The counter argument of learned counsel for the first to seventh defendants was that the fact the annual accounts for the year ended 31 December 2004 was unanimously approved by the AGM after being deliberated at the AGM (see p 278 of bundle B2, pp 268–270 and 272–276 of bundle B2) all issues raised by the plaintiff in this proceedings had been ventilated and resolved by the AGM. In the final analysis the said annual report and balance sheet for 2004–2005 was unanimously approved by the sanction of all the members who attended the AGM (see pp 339 and 352 of bundle B2).

[45] In view of the fact that all members present during the AGM had endorsed the club's account after a full deliberation including their acceptance that the club has recovered the entire costs of investment, learned counsel for the first to seventh defendants submitted that it is not opened to this court to interfere and reverse the said decision as the court ought not to act as a Court of Appeal against the unanimous decision of the AGM.

[46] Having gone through the various authorities such as *Tharmalingam v Sambanthan* [1961] 1 MLJ 63; *Charan Dass a/l Sadhu Ram v YM Tunku Abd Aziz & Ors* [2006] 3 MLJ 416; *Datuk Pasamanickam & Anor v Agnes Joseph R Narayanan Samy v Agnes Joseph* [1980] 2 MLJ 92 as well as cases from other jurisdictions submitted by learned counsel for the first to seventh defendants I was satisfied that this being a dispute between the members and the club whose rights and obligations are determined by the club's rules, the relationship is one of contract. By accepting membership of the club a member of the club

contracted to be bound by the club's rules. Hence the relationship between the members vis-a-vis the club and as between the members are contractual in nature. Unless if it can be proved that the club had acted ultra vires the club's rules, the courts would be reluctant to interfere with the internal affairs of the club. Therefore in view of the contractual nature of the relationship the members are contractually bound to accept the majority decision of the members decided by the AGM. Whatever differences and or dispute between the members and the club must be resolved within the constraint of the club's rules. As had been pointed by His Lordship Raus Sharif (now the President of the Court of Appeal) in *Charan Dass a/l Sadhu Ram v YM Tunku Abd Aziz & Ors* [2006] 3 MLJ 416 quoted by learned counsel for the first to seventh defendants the courts would be reluctant to interfere with the dispute as 'whatever disputes relating to the rights and privileges of the members of the club should be resolved within the rules of the club. The management of the club should be allowed to administer the club without interference from the courts'. Hence the court would only interfere with the decisions of the members only if it is contrary to the club's rules.

[47] Pertaining to the fact whether the first to seventh defendants had acted ultra vires the club's rules in deciding to invest in Fountain View shares as no notice pursuant to rule 24 of the club's rules had been issued to the ordinary members in accordance with the provision of rule 24 of the club's rules, learned counsel for the first to seveth defendants had taken the court through the various definitions of the word 'expenditure' and concluded that the word expenditure connotes 'something that diminishes the total assets of the club as the money is taken out of the coffers of the club and used up or consumed'.

[48] Quoted below the definition of the word '*expenditure*' as illustrated by learned counsel for the first to seventh defendants:

(a) the words 'expenditure, expended expenses' in a revenue context as defined in an English case of *Oram (Inspector of Taxes) v Johnson* [1980] 2 All ER 1 means 'primarily money expenditure and secondly, expenditure in money's worth, something which diminishes the total asset of the person making the expenditure';

(b) in *Commissioner of Income Tax, UP v Nainital Bank Limited* AIR 1967 SC 453 the court ruled that normal meaning of the expression 'expenditure' denotes 'spending', or 'paying out or away' ie something that goes out of the coffers of the assessee';

(c) Anandan Krishnan in *Words, Phrases and Maxims, Legally & Judicially Defined*, Vol 6, E defined — 'Expenditure' to mean 'amount expended and expended means to pay away, lay out or spend. It really represents money out of pocket, a going out'; and

(d) In *Words and Phrases Legally Defined*, (4th Ed), under the General Editorship of David Hay MA the definition of 'consumption' is included in the definition of the word 'expenditure' and 'to use up' is included in the definition of the word 'expend'.

[49] Learned counsel for the first to seventh defendants had also attempted to examine the legal interpretation of the word 'investment' from decided cases as well as from *Words, Phrases and Maxims, Legally Defined* and concluded that 'the word 'investment' must be construed in the ordinary and popular sense and is thus the laying out of money at risk to purchase property, shares, etc with the expectation of income, profit, interest or dividend from such investment. Income plays a decisive role on whether the special species of property from which it was derived was an investment'.

[50] After having the benefit of examining at the various definitions of the word 'expenditure', 'expended', 'expenses' as illustrated by both learned counsels I am more inclined to accept the definition given by learned counsel for the first to seventh defendants that these words mean and or have the effect that something that diminishes the total assets of the club as the money is taken out of the funds of the club and used up and or consumed. In other words the word 'expenditure' is given a very restrictive meaning as compared to the submission of learned counsel for the plaintiff that the said word ought to be given a broad and or wider meaning so as to encompass almost any expenditure be it loans or genuine investments. Hence I am of the view that the transactions undertaken by the committee were not expenditure per se as envisaged by rule 24 of the club's rules. In view of the above I found that for the purposes of investment of this nature, which was the purchase of shares from Fountain View by way of the put and call option the committee was not required to comply with the provision of rule 24 of the club's rules. Hence the committee had not acted in contravention of rule 24 of the club's rules. Further having perused the opinion relied by learned counsel for the plaintiff by Messrs Kadir, Andri Aidham & Partners I am of the view that the said opinion is not relevant for our purpose as the context within which the opinion was sought was very much different from the case at hand which was, whether rule 24(b) applies only to a proposed expenditure incurred in one instance or whether a series of connected expenses which together exceed RM500,000.

[51] Further I wish to reiterate that I am not bound by the opinion prepared by Messrs Kadir, Andri Aidham & Partner (see pp 29–32 of bundle B2). This court is entitled to come up with its own independent findings and conclusion based on the evidence both testimonial as well as documentary presented before it during the trial.

[52] I would answer the second issue posed for this court's determination

A that the committee had not acted ultra vires rule 24 of the club's rules as investment is not expenditure as envisaged by the said rule. Therefore rule 24 does not apply to the investment undertaken by the committee.

ISSUE (c) AND (d)

B

Whether the Trustee Act 1949 applies to the club and whether the first to seventh defendants acted in breach of trust and or breach of fiduciary duty when they took the various decisions relating to the two transactions.

C

[53] Rules 24(a) of the club's rules provides that all funds and property of the club shall be vested in the Committee. Hence the Committee acts as trustee for ordinary members of the club. Section 5(3) of the Trustee Act 1949 provides that the trustee may invest trust funds in any security. Section 5(3) stipulates D that trust funds shall be invested in shares in Bursa Company with a paid up capital of at least 5 million and such company had at least five years immediately preceding the year of investment paid dividend.

[54] Section 5(3) of the Trustee Act 1949 would have to be reconciled with E s 2(2) of the same Act. Section 2(2) of the Trustee Act relate to the powers of the Trustee Act 1949 which are in addition to the powers conferred by the instrument, in this case the club's rules, if any creating the trust. Section 5(3) of the Trustee Act 1949 provides that the provisions of this section apply only in F so far as the contrary intention is not expressed in the instrument creating the trust and shall have effect subject to the terms of that instrument.

[55] Perhaps it would be apt at this juncture to examine the relevant provisions in the club's rules in order to determine if the investment was G sanctioned by the club's rules. The relevant provisions in the club's rules are rules 2(o), 2(p) and 24(a). Rule 2(o) provides that the Committee is empowered to invest its funds in such assets or in such manner as it may think fit. Rule 2(p) gives a very broad power to the committee to do everything that is necessary or desirable or incidental to any of the objects listed under para H 2(a)–(o) of the club's rules. Whilst rule 24(a) provides for the funds of the club to be vested in the Committee for the time being as trustee for ordinary members of the club. Pursuant to rule 24(a) the Committee is vested with the powers to control the funds and property of the club as well as the entire management of the affairs of the club.

I

[56] Rule 2(o) of the constitution empowers the Committee to invest the funds of the club in such asset and in such manner as the Committee deems fit. Further rule 2(p) gives the Committee a blanket power to do everything that is necessary or desirable or incidental to the objects stated in para 2(a)–(o). Hence

rule 2(o) is a specific provision with regards to investment of the club's fund and rule 2(p) is ancillary to the main object which enables the club to carry out its primary object.

[57] Having reconciled all the relevant provisions in the club's rules as illustrated above I am of the view that the Committee was empowered to invest the club's funds in such asset or in such manner it 'may think fit'. The power vested with the Committee is wide enough to cover the second put and call agreements entered into between the club and Dato' Chin. This power is provided in the trust instrument in the form of the club's rules. The trust instrument had provided that the Committee may invest the club's funds as the Committee may deem fit not withstanding what is provided in the Trustee Act 1949.

[58] A reconciliation of s 2(2) of the Trustee Act 1949 and the trust instrument in the form of the club's rules would show that the powers of the Trustee Act 1949 are in addition to the powers conferred by the club's rules. Further the Trustee Act 1949 provides that the provision of the Act are only applicable if and only if the contrary intention is not expressed in the club's rules. In the case at hand there is an express contrary provision via rule 2(o) of the club's rules to empower the committee to invest the funds of the club in such asset or in such manner as it may think fit. Hence the provision of the club's rules overrides s 5 of the Trustee Act 1949.

[59] Learned counsel for the defendants had drawn this court's attention to some English authorities on point to persuade this court to accept learned counsel's submission that the provision of club's rules ought to be given significance as compared to the Trustee Act 1949 which had expressly provided for situation in the event there is the contrary intention provided in the club's rules then that intention shall prevail.

[60] A provision in the English Trustee Act 1925 which was identical to the case at hand was discussed in the case of *Re Turner's Will Trusts, District Bank, Limited v Turner* [1937] Ch 15 which was quoted by learned counsel for the defendant, the Court of Appeal held that s 69(2) of the Trustee Act provided that 'in a case where contrary intention is expressed in the instrument creating the trust, that contrary intention prevails'. Similarly in *Inland Revenue Commissioners v Bernstein* [1960] Ch 444, *Re Geering (deceased) Gulliver And Anor v Geering And Ors* [1964] CH 136 the courts had express that the section in the Trustee 1949 Act would be applicable only if there is no contrary intention expressed in the trust instrument.

[61] Further in *Re Peczenik's Settlement; Cole and Another v Ingram And Ors* [1964] 2 All ER 339 the court had held that 'the general rule, that clauses in

trust deeds which enlarged trustees' powers of investment beyond the scope authorised by law to be construed strictly, did not impose on the court any duty to put an unduly restricted construction on the language of a particular investment clause'.

[62] In view of the above my answer to this issue is that the Trustee Act 1949 would be applicable to the club only if there is no contrary intention expressed in the instrument creating the trust. If there is contrary intention then the contrary intention prevails. Therefore the plaintiff's contention that the Committee had acted in breach of trust is devoid of any merits and ought to be dismissed by this court.

[63] As regards to the plaintiff's contention that there was no due diligence exercise conducted by the Committee and or a proper meeting to discuss the huge investment proposal that was to be undertaken by the club which the plaintiff claimed had resulted in the club to have suffered severe losses, I found that the Committee had acted prudently in carrying out their obligations entrusted by the club's rules. Firstly the plaintiff had sought the advise of an independent financial advisor Messrs TH Law & Co, a firm of chartered accountants in regards to investment in publicly quoted shares, who had advised the Committee to consider entering into a put and call option agreement. According to Messrs TH Law & Co this way the club would be assured of investment returns (see p 175 of document C1). The advise was sought prior to the execution of the second put and call option agreements.

[64] Besides that the Committee had also the benefit of the expertise of DW1 who had the necessary financial background having graduated with a degree and Masters degree in Business Administration specialising in Finance. DW1 too had served in a stock broking house known as Kimara Equity. The proposal to embark on the put and call option was also initiated by the late Mr Tan Kheng Seng who himself had the experience in financial service industry. DW2 who was elected to the Committee of the club since 26 June 1997 too is an experienced businessman and had invested in shares and companies, one of which was Morisen (now part of IOI which is listed). With these facts I found that the Committee had acted prudently and reasonably required of them as Committee of the club. Hence based on the facts as illustrated above I found that the plaintiff's pleaded case that the Committee had acted in breach of fiduciary duty when they entered into the two transactions on behalf of the club was unproven and dismissed by this court.

ISSUE (e)

Whether the club suffered a loss of RM2,226,771.35 as a result of the two transactions

[65] A perusal of the plaintiff's SOC, especially para 12 (see p 19 of bundle

A) would show it was the plaintiff's pleaded case that by entering into the two transactions for the purchase of the Fountain View shares the Committee had caused the club to lose a sum of RM16m which the club had prudently accumulated over the years. However no evidence was led by the plaintiff or PW2 to prove this claim. PW1 was in no position to demonstrate to the court that the said monies was not paid and or received by the club. When cross-examined by learned counsel for the first to seventh defendants if PW1 knew the said sum had been recouped his flat answer was 'I don't know'. This answer was given to this court despite the plaintiff having the full knowledge that the information pertaining to all matters relating to the said shares had been stated in AGM Report of 2006 which was received and read by the plaintiff prior to this proceeding. These issues were also subject to strenuous debate during the 2004 and 2006 AGM where members had queried the Committee on a couple of issues similar to the ones put forth before this court. The issues pertaining to these two transactions were raised by members such as one, Mr Stephen Wong (see pp 268–270 of bundle B2), Mr K Anantham (at pp 272–274 of bundle B2), Mr Cheam Tat Pang (at pp 275–276 of bundle B2) and Mr Lau Kam Yuen (see p 276 of bundle B2). It would appear that despite the allegation of under-recovery of the RM2,226,771.35 by a particular member the said 2005 annual accounts were passed.

[66] The plaintiff had also admitted that bundle C1 which was tendered in court was left at his house in December 2010 well before the trial date. It was without doubt that all particulars pertaining to the Fountain View shares were well within the plaintiff's own knowledge before the plaintiff took the stand on 20 February 2012. Hence the full information that the said sum of RM10m and RM3.8m had been recovered from Dato' Chin were within the plaintiff's own knowledge. The documents which was in the plaintiff's possession well before the trial date proved that the said amount was a non issue. This clearly proved that the plaintiff was not a witness of truth while taking the stand to prove his pleaded case and had other ulterior motive in pursuing this case against the first to seventh defendants.

[67] The plaintiff submitted that there were three telling and contemporaneous documents that proved to this court the club had suffered a loss of RM2,226,771 as a consequence of the Committee having entered into the two transactions on behalf of the club. The first was Dato' Chin's 21 November 2005 letter (see p 116 of bundle B3). The second was DW1's 5 December 2005 report (at pp 149–152 of bundle B3) and lastly the minutes of the Committee's meeting held on 6 December 2005 (at pp 138–139 of bundle B3).

[68] The plaintiff had also applied to the court for one Mr Tang Kin Kheong from Messrs Mazars, a firm of chartered accountants to carry out the

investigations into the accounts and records of the club pertaining to the two transactions involving Fountain View shares and succeeded in obtaining the order dated 22 April 2010 for the said Mr Tan Kin Kheong to be appointed for the said purpose. Mr Tan Kin Keong ('PW2') had conducted the investigation and submitted his findings (exh C5 dated 18 January 2012). According to PW2 'there was under recovery of RM2,226771.35' which PW2 termed them as 'in accounting terms means 'bad debt and ultimately a loss'.

[69] DW3 who was an independent witness and directly involved in auditing the club's account had also testified that whilst auditing the club's account he did not detect any loss of RM2,226,771.35 as claimed by the plaintiff herein. Further DW3 had testified that the club had taken into consideration the actual costs of investment instead of option price, which includes the investment costs with profits as this was 'The club's accounting policy in quoted shares like FVD is to value the shares at a lower of cost and market value, meaning that the cost of investment must be reflected in the accounts at its actual cost or market value, whichever is lower.' DW3 further reiterated thaf 'for accounting purposes the actual amount paid from investment is taken into account and not the option price which includes the expected profit from investment' (see Q&A 21 of WSDW3).

[70] DW3 had confirmed that the entire costs of investment had been recovered as reflected in 2005 annual accounts (at p 309 bundle B2) as had been reflected at p 1 of bundle B3 the cash flow of the actual investment and the return of investment with profit of RM2,3330,866.73 (see Q&A 14, 19 and 20 of WSDW3). DW3 had also confirmed that the club had during the financial year recovered the entire cost of investment of RM20,045.640 by a combination of disposal of quoted shares in open market and the settlements agreement with third party who has defaulted on the put and call option. RM3.8m as shown in Note 5 to the financial statement had been received on 10 March 2006 (see p 309 of bundle B2, also see p 310 of bundle B20). Even the PW2 who was the plaintiff's witnesses had confirmed that if the RM2.6m sponsorship sum of RM1.35m and RM1.25m was not to taken into account and if one were to take the option price instead of the actual price there would be loss of RM2.226m. However PW2 reiterated in cross-examination by learned counsel for the first to seventh defendants if these figures were to be taken into account there would be a profit of RM2,330,866.73 (also see Q&A 49–52 of WSDW3). PW2 admitted that the financial statement did reflect a profit of RM2.3m.

[71] Both the plaintiff and PW2 confirmed that if the sponsorship amount of RM1.35m and RM1.25m were not taken into consideration and the option price were considered instead of the actual price there would be a loss of RM2,226m. If the reverse was considered there would a profit of

RM2,330,866.73. PW2 had also admitted in evidence that if the sponsorship amount of RM2.6m was adjusted in favour of the club then there would be no loss to the club. DW2 had also confirmed that even if the RM2.6m is taken into consideration together with the actual costs of investment the club had not suffered any losses.

[72] On the totality of evidence before me I am satisfied that the plaintiff had failed to discharge the burden placed by the law to prove that the acts of the first to seventh defendants in venturing into the two alleged transactions had resulted in the club having suffered losses as stated in para 12 (at p 19 of bundle A) and or RM2,226,771.35 as submitted in the plaintiff's written submission.

ISSUE (f)

What relief should the court grant if liability is established against the first to seventh defendants.

[73] In light of the my above findings I am satisfied that the plaintiff is not entitled to all the prayers sought under item 'relief' in para 15 of the SOC. Therefore I would not delve on this issue.

CONCLUSION

[74] On the totality of the evidence adduced by the plaintiff through PW1 and PW2 both testimonial and documentary I am satisfied the plaintiff had not discharged the onus of establishing its pleaded case against the defendants on the balance of probabilities. Hence the plaintiff's claim against the defendants is dismissed with costs. In arriving at the above decision I had carefully considered the evidence adduced by the plaintiff as well as the first to seventh defendants, the submissions by both the respective parties and authorities tendered in support of their respective submissions.

[75] I would like to express my sincere thanks to both learned counsel for their commitment and effort in the smooth conduct of the matter as well as their well researched submissions to assist me in arriving at this decision.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum